STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 1, 2005
v	No. 250439 Wayne Circuit Court
JOHN SWANIGAN, Defendant-Appellant.	LC No. 03-003372-01

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 225 or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to a prison term of ten to thirty years for the possession with intent to deliver cocaine conviction, time served (i.e., twenty-six days) for the possession with intent to deliver marijuana conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. Admission of Evidence

Defendant first argues that he is entitled to a new trial because the prosecutor improperly elicited the testimony that no one inside the house, including defendant, responded to the police when they knocked on the front door, or approached them after they gained entry, as substantive evidence of guilt. Defendant contends that the testimony constituted (1) an improper infringement on his right to remain silent, (2) improper use of an other individual's silence against him, and (3) irrelevant and prejudicial evidence. We disagree.

Initially, we reject defendant's assertion that the prosecutor's use of his pre-arrest silence is a constitutional issue.[1] Because the referenced silence did not pertain to defendant remaining silent in the face of police interrogation or his invoking his right to remain silent in reliance on

[1] The Fifth Amendment and Const 1963, art 1, § 17, provide that, in a criminal trial, no person shall be compelled to be a witness against himself. *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992).

Miranda[2] warnings, the silence is not constitutionally protected. *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d 312 (1992). Therefore, the admissibility of defendant's pre-arrest silence presents an evidentiary issue, governed by the Michigan Rules of Evidence. *Id.* at 167.

Because defendant failed to timely object to the admission of the challenged testimony, this issue is unpreserved. Therefore, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Generally, all relevant evidence is admissible at trial. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. But even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

Defendant has failed to demonstrate plain error. At trial, the prosecution theorized that defendant was operating a drug house, either as a principal or an aider and abettor,[3] and that his claim that he was at the house only to collect the rent was not credible. Police witnesses testified that, in response to their knocking and announcing their presence, they heard footsteps and yelling, saw shadows of people running throughout the living area, and that none of the seven people in the house, including defendant, answered the door. After forcibly gaining entry, no one approached the officers, and they had to disperse to locate the people in the house.

Given the prosecution's theories, the challenged testimony was relevant. Presumably, a landlord on the premises only to collect rent would likely respond to the police, particularly where the police could easily be seen on the closed circuit television located in the living room and could easily be heard during the time they continuously rammed the steel-framed door. Additionally, testimony regarding the other individuals' conduct was relevant to the prosecution's theory that all of the individuals in the house were likely scattering and hiding drugs, which was relevant to show that all the individuals, including defendant, were aware that the residence was a drug house. In short, there were legitimate, material, and contested grounds on which to offer the evidence. MRE 401. Furthermore, the probative value of the evidence was not substantially outweighed by its prejudicial effect. MRE 403. Defendant is not entitled to a new trial on the basis of this unpreserved issue.[4]

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] "Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *Carines*, *supra* at 757.

[4] Contrary to defendant's suggestion, the prosecutor did not engage in misconduct by referring to the challenged evidence during closing argument. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

II. Sufficiency of the Evidence

Next, defendant argues that the evidence was insufficient to support his convictions because there was no proof that he possessed the controlled substances or the firearms. Defendant contends that mere presence is insufficient to prove constructive possession and that the evidence linking him to the house was scant. We disagree.

A. Standard of Review

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515.

B. Possession with Intent to Deliver Controlled Substances

To sustain a conviction for possession with intent to deliver 225 or more but less than 650 grams of cocaine, the prosecution is required to show (1) that the recovered substance was cocaine, (2) that the cocaine was in a mixture weighing between 225 and 650 grams, (3) that the defendant was not authorized to possess the cocaine, and (4) that the defendant knowingly possessed the cocaine with the intent to deliver it. *Wolfe, supra* at 516-517; *People v Catanzarite*, 211 Mich App 573, 577; 536 NW2d 570 (1995).

The offense of possession with intent to distribute marijuana requires that the prosecution prove beyond a reasonable doubt that (1) the substance recovered is marijuana, (2) the marijuana weighed less that five kilograms, (3) the defendant was not authorized to possess the marijuana, and (4) the defendant knowingly possessed the marijuana with the intent to deliver it. MCL 333.7403(2)(d)(iii).

Possession[5] of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Wolfe, supra* at 519-520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 520. A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. *Id.* "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant knowingly possessed the cocaine and the marijuana. The evidence, if believed, supported an inference that defendant

[5] For both offenses, defendant challenges only the possession element.

used the house as a drug house, that he had constructive possession of the controlled substances in the house, and that he hid a large amount of cocaine in the basement as the police were knocking on the door. There was undisputed evidence that defendant owned the house, and defendant was present at 10:00 p.m. when the search warrant was executed. Additionally, a phone bill addressed to defendant at the residence was found in the house, and defendant's driver's license showed his address at the residence. There was also undisputed evidence that the elaborate security system on this modest house was installed on defendant's behalf. Although defendant claimed that he was at the house only to collect rent, no documentation of rental agreements or rental payments was produced. Furthermore, testimony revealed that neither defendant, nor anyone else in the house, responded during the two to three minutes that the police continuously rammed the front door, or approached any officer inside the house. Rather, as the police were knocking, they heard yelling and footsteps, and saw shadows of people running throughout the living area.

There was evidence that, when the police entered the house, a large television with a video game was playing next to the closed circuit television showing the exterior of the home. The smell of marijuana was apparent inside the house. In the living room, an officer immediately observed, in plain view, a large, clear plastic bag containing marijuana, two small scales, a cellular telephone, a loaded, nine-millimeter magazine on the entertainment center, and a loaded nine-millimeter handgun on the arm of a chair. In the corner, the police found a canvas bag that contained a large plastic bag of loose marijuana, a second large plastic bag containing four smaller bags of marijuana, and various packaging materials. An officer found defendant coming upstairs from the basement, where the police found a Rubbermaid container that contained more than 408 grams of cocaine and a forty-caliber firearm.

From this evidence, a jury could reasonably infer that defendant hid the cocaine and the firearm in the basement as the police were attempting to gain entry to search the house. Additionally, given that a large amount of marijuana was in plain view, a jury could reasonably infer that defendant had constructive possession of that marijuana, as well as the marijuana in the canvas bag that was in the same room. Furthermore, although the drugs could have belonged to other people in the house, possession may be joint, *Wolfe, supra*.[6] Although defendant asserts that the evidence linking him to the drugs was weak, this Court will not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses. *Wolfe, supra.* Moreover, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's convictions of possession with intent to deliver 225 or more but less than 650 grams of cocaine, and possession of with intent to deliver marijuana.

[6] At trial, the prosecutor advanced alternative theories that defendant was guilty either as a principal or as an aider and abettor.

C. Felony-firearm

We also reject defendant's claim that there was insufficient evidence that he had constructive possession of a firearm. The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of any felony other than those four enumerated in the statute. MCL 750.227b(1); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession of a weapon may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). "[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *Id.* at 470-471.

As previously indicated, a loaded, nine-millimeter firearm was found on the arm of a chair in the living room, which was the same room where a large amount of marijuana was found. Given that the firearm was in plain view, the jury could reasonably infer that defendant knew its location and that the gun was reasonably accessible. Additionally, another firearm was located on top of the cocaine found in a container in the basement. As previously indicated, there was evidence that defendant was apprehended coming from the basement, approximately fifteen feet from the firearm and the cocaine. A jury could reasonably infer that defendant hid the weapon in the basement and, therefore, that it was reasonably accessible to defendant. Contrary to defendant's claim, the fact that he was not found in a room with a firearm at the time of his arrest is not dispositive. The appropriate focus for determining possession does not involve the circumstances at the time of arrest, but rather the circumstances surrounding the possession of the gun at the time of commission of the felony. *People v Burgenmeyer*, 461 Mich 431, 438-439; 606 NW2d 645 (2000). Furthermore, whether defendant owned the firearm is immaterial under the statute. *Id*. at 438; *Hill*, *supra* at 474. Therefore, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction of felony-firearm.

III. Expert Testimony

Defendant agues that the trial court abused its discretion by allowing a police officer to testify as an "expert" on defendant's guilt as a drug dealer. Defendant contends that "it was improper for the police officer to testify that in their [sic] opinion, a drug dealer would have maintained the quantity of drugs found in this case." We disagree.

The evidence demonstrated that during the raid, the police found more than 408 grams of cocaine, a large amount of marijuana, and two scales. An officer, who was a member of the Special Investigation Bureau, primarily narcotics, and had executed more than fifty narcotic search warrants, testified that, given the evidence and the quantity of drugs, the drugs at issue were for sale and not consistent with personal use.

Because defendant failed to object to this evidence,[7] we review this unpreserved issue for plain error affecting substantial rights. *Carines*, *supra*.

[7] Before the challenged testimony was given, the officer testified regarding his general (continued…)

Defendant appears to argue that the trial court allowed improper drug profile evidence. "Drug profile evidence has been described as an 'informal compilation of characteristics often displayed by those trafficking drugs.'" *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Drug profile evidence may be admitted if (1) it is offered as background or modus operandi evidence, and not as substantive evidence of guilt; (2) other evidence is admitted to establish the defendant's guilt; (3) the appropriate use of the profile evidence is made clear to the jury; and (4) no expert witness is permitted to opine "that, on the basis of the profile, the defendant is guilty," or to "compare the defendant's characteristics to the profile in a way that implies that the defendant is guilty." *People v Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000). Expert testimony is admissible if the expert is qualified, the evidence gives the trier of fact a better understanding of the evidence or assists in determining a fact in issue, and the evidence is from a recognized discipline. *Murray*, *supra* at 52-55.

Defendant has failed to demonstrate a plain error affecting his substantial rights. Initially, the alleged expert testimony in this case is not the type of "drug profile evidence" condemned for use as substantive evidence of guilt. See, e.g., *Hubbard*, *supra*. The challenged testimony did not relate to characteristics of a typical person engaged in specific illegal activity. *Murray*, *supra* at 52. Rather, the officer's knowledge of the drug trade was used to help the jury understand the significance of the amount of cocaine at issue. This Court has held that expert police testimony regarding the quantity of drugs found and the packaging is permitted to show that the defendant intended to sell the drugs and not simply use them for personal consumption. See *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991).[8]

Even if the evidence was not admissible, defendant cannot demonstrate that it prejudiced the outcome of the trial. The challenged testimony was of comparatively minor importance considering the totality of the evidence against defendant. As discussed in part III, there was substantial other evidence supporting defendant's conviction, including his ownership of and presence in the house, the amount of drugs found inside his house, and his proximity to the drugs when he was arrested. Moreover, defendant's defense did not relate to the quantity of drugs confiscated and whether they were intended for sale or personal use, but whether he, as a landlord of the premises, actually possessed the drugs. Therefore, reversal is not warranted on this basis.

(…continued)

background and experience. Defense counsel then objected to the officer testifying as an expert. The court noted that the officer had not yet provided an opinion, but was testifying "as to facts based on his experience." Defense counsel withdrew his objection, and stated, "I'll withdraw and use it for cross-examination." When the officer subsequently testified regarding the probable purpose of the drugs, defense counsel did not object.

[8] The prosecutor never moved to qualify the officer as an expert witness. Defendant did not object to this omission, however, and we find no plain error in the prosecutor's omission. A police officer may testify as an expert on drug-related law enforcement by virtue of his training and experience. *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993). Given the officer's testimony with respect to his training and experience in the area of narcotics, he was qualified to testify about the significance of the items found in defendant's house. Thus, defendant cannot demonstrate any prejudice. *Carines*, *supra*.

IV. Prosecutorial Misconduct

Defendant also argues that the prosecutor engaged in misconduct by eliciting the irrelevant and prejudicial evidence that his name was on the search warrant, and thereafter commenting on that fact during closing argument. We disagree.

Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). But because defendant failed to object to the prosecutor's conduct below, we review his unpreserved claims for plain error affecting substantial rights. *Carines*, *supra* at 752-753.

Defendant has not demonstrated plain error. Initially, defendant has presented no case law to support his assertion that the prosecutor's mention of the accurate fact that his name was on the search warrant constituted misconduct. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, or give an issue cursory treatment with little or no citation of supporting authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Moreover, a finding of prosecutorial misconduct cannot be based on a prosecutor's good-faith effort to admit evidence, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and, here, defendant has made no showing that the prosecutor acted in bad faith.

Even if plain error occurred, defendant cannot demonstrate prejudice. It was undisputed that defendant owned the house. Additionally, during trial, police witnesses testified that the house was under surveillance before the search warrant was issued, and that defendant was not observed during any of the surveillance. Thus, the evidence that defendant's name was on a search warrant for a house that he owned was inconsequential. Furthermore, the trial court instructed the jury that defendant was presumed innocent, that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, and the fact that defendant was charged was not evidence of guilt. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, this unpreserved claim does not warrant reversal.[9]

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski

[9] Within this issue, defendant suggests that the cumulative effect of several errors deprived him of a fair trial. But because no cognizable errors warranting relief have been identified, reversal under the cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).